IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940.

No.....

FUNKS GROVE GRAIN COMPANY,

*Petitioner,*

v.

THE ALTON RAILROAD COMPANY,

*Respondent.*

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## I.

### Opinion of the Court Below.

The opinion of the Court below will be found at pages 281-291 of the record.

## II.

### Basis of Jurisdiction Herein.

Jurisdiction herein is conferred by Section 240, as amended, of the Judicial Code, Title 28, Section 347 (a).

It will be noticed that said section, Title 28, 347 (a) gives to this Honorable Court power to review any case decided by the Circuit Court of Appeals and since the abrogation of all review by repeal or writ of error, the statute being remedial should be liberally construed.

While the exercise of jurisdiction is discretionary, we think that particularly because of the conflict between the decisions of the Circuit Court of Appeals and our State Supreme Court, and for the other reasons relied on, this jurisdiction should be exercised herein, as was said in *Forsyth* v. *Hammond*,[11] wherein was involved the question of a conflict of the decisions of the Supreme Court of the State and Federal Court of Appeals respecting the validity of the annexation of a territory to a city, and the Court said on pages 514 and 515:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.
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> "Among the considerations thus suggested are those which indicate why in this case the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the circuit court of appeals for the seventh circuit and the supreme court of the state of Indiana. The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that that

[11] 166 U. S. 506, 514, 515, 17 S. Ct. 665, 41 L. Ed. 1095.

territory was to be considered by all the officers of the state of Indiana as within the territorial limits of the city. The United States circuit court of appeals by its decision in this case had declared that such annexation proceedings were invalid; and that the property of this petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the circuit court of appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the supreme court of the state, withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The similarity of the question involved in this decision and that involved in this petition will be noted by the Court.

## III.

### Specifications of Error.

The errors intended to be urged are those specified in the accompanying petition under the heading "Questions Presented" at pages 7 and 8, numbered 1 to 6, the same being assigned as errors.

## IV.

## ARGUMENT.

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### 1.

**The United States Circuit Court of Appeals herein erred in attributing to an act of the Illinois Commerce Commission (Exhibit "D") a meaning and effect forbidden by the statute authorizing its issuance.**

Under this heading we respectfully call the Court's attention to the fact that in arriving at its conclusion the Court below placed the same upon an erroneous basis, in considering Exhibit D a legislative act.

The Public Utilities Act under which the Illinois Commerce Commission acted herein conferred plenary power upon the Illinois Commerce Commission to pass upon all questions in which the reasonableness of the rates charged by carriers are involved.

Section 32 [12] thereof so far as applicable is as follows:

> "All rates or other charges made, demanded or received by any public utility, * * * for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such * * * service is hereby prohibited and declared unlawful."

Section 60 [13] provides:

> "The Commission * * * shall have power to hold investigations, inquiries and hearings concerning any

[12] Chap. 111⅔, Rev. Stat., S. B. A. Ed., 1939, par. 32, 111⅔, Sec. 32.
[13] Chap. 111⅔, I. R. D., S. B. A. Ed., 1939, par. 64, 111⅔, Sec. 60.

matters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the commission may establish."

Section 72 [14] of the Act is in words as follows:

"When complaint has been made to the Commission concerning *any rate* * or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount."

It is obvious that jurisdiction was invested in the Illinois Commerce Commission to pass upon the reasonableness of the rates herein as it has done.

It is also obvious that the sections above quoted specifically prescribe that it was unlawful for any public utility to charge any unreasonable rate for its service and the Commission was empowered to investigate upon complaint or upon its own motion *any rate* charged by a public utility at *any* time and Section 72 gave the Commission the right to award reparation against *any rate* which is excessive.

The Public Utilities Act of Illinois contains no provision giving to the Illinois Commerce Commission the power to fix a reasonable schedule of maximum rates, but

[14] Chap. 111⅔, I. R. D., S. B. A. Ed., 1939, par. 76, 111⅔, Sec. 72.
* Italics ours.

is wholly silent on that subject. This power is given it solely by the provisions of Section 8 [15] of the so-called act to prevent extortion and unjust discrimination which is as follows:

> "Sec. 8. The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers and freights, and cars of each of said railroads; and said schedules shall in all suits brought against such railroad corporations wherein is, in any way involved the charges of any such railroad corporation for the transportation of any passenger or freight, or cars, or unjust discrimination in relation thereto, *be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed, are reasonable maximum rates of charges for the transportation of passengers and freights, and cars upon the railroads for which said schedules may have been respectively prepared.*" (Italics ours.) [16]

The above mentioned act was passed prior to the organization of the present Illinois Commerce Commission or its predecessor. The present Public Utilities Act, passed in 1921, contains the following provision in Section 87 [17] thereof:

> "Nothing in this Act shall be construed to repeal any other Act or part thereof conferring power on said Board of Railroad and Warehouse Commissioners or on the State Public Utilities Commission or the Public Utilities Commission except such as are in direct conflict therewith, but the rights, powers and duties conferred by such other Act or Acts upon the Board of Railroad and Warehouse Commissioners, the State Public Utilities Commission, and the Public Utilities Commission shall be continued in full force

[15] Chap. 114, I. R. S., 1939 S. B. A. Ed., par. 125, p. 2591.
[16] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

and transferred to the Illinois Commerce Commission, it being the intent of this Act to substitute with respect to such other Act or Acts the Illinois Commerce Commission for the Public Utilities Commission." [17]

At the time of the passage of said Section 8 of the Extortion Act the courts of common law had jurisdiction to pass upon all questions of reparation, which power was taken away from the Courts in the first instance and invested in the Illinois Commerce Commission under Section 72 [17] of the Public Utilities Act, and by said Section 8 [16] and nowhere else therein has the Illinois Commerce Commission been invested with the power of fixing statewide schedules of reasonable maximum rates, so it follows that the only power given the Commission to fix a schedule of reasonable maximum rates (Exhibit "D" herein) is given solely by Section 8 [16] of the Extortion Act aforesaid.

Construing the above quoted provisions of the Public Utilities Act *in pari materia* with Section 8 of the act to prevent extortion, etc., quoted as above set forth, it clearly appears that the Illinois Commerce Commission had jurisdiction to determine the reasonableness of the rates charged herein. The so-called schedule of maximum rates (Exhibit "D," Tr. 193-213), being by statute, which authorized the same, merely *prima facie* evidence on the subject matter of the reasonableness of the schedule of maximum rates, it follows that the Master correctly stated the law in the supplemental report which was approved by the trial Judge in stating:

"(f) Under the Statute of the State of Illinois and the decisions of the Illinois Supreme Court, the effect given to Defendant's Exhibit "D" is that it

[17] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., par. 91, 111⅔, Sec. 87.

was *prima facie* evidence of the reasonableness of the rates and casts the burden upon the claimants to show that the rates were unreasonable. In the absence of evidence before the Master to the contrary, the presumption arises that the claimants met this burden of proof in the hearing before the Illinois Commerce Commission.

"(g) It is also the Law of the State of Illinois that a reasonable maximum rate means simply a reasonable limit beyond which the railroads cannot go in fixing the rates." (Tr. 250.)

The rates assailed and condemned by the Commission had never been prescribed or fixed by the Illinois Commerce Commission under any authority contained in the Public Utilities Act and therefore did not present a legislative question. On the contrary they are within the purview of the so-called reasonable maximum scale of rates passed under Section 8 of the Extortion Act, and the question of reasonableness was an open question for the Commission to pass upon from the evidence before it, which included this Exhibit "D". This it did in this case.

The Court below evidently considered Exhibit "D" (Tr. 193-213), to be a legislative act, whereas the act under which it was passed specifically provides that it is a rule of evidence, being only *prima facie* evidence on the reasonableness of the rates charged, which question was presented to the Commission and rebutted by evidence heard by it and is concluded by the orders of the Commission entered herein—Exhibits "1" and "2" (Tr. 98-130).

The petitioner, the respondent, the United States District Court and the United States Circuit Court of Appeals herein all agree that in adopting this Schedule of Reasonable Maximum Rates, Exhibit "D" herein, the Illinois Commerce Commission was acting under the special power conferred upon it by Section 8 [19] of the Extortion Act.

2.

**The act authorizing the order, Exhibit "D," in this case did not confer upon the Illinois Commerce Commission any jurisdiction to pass a legislative act.**

It is well settled law in the State of Illinois as determined in *C. B. & Q. R. R. Co.* v. *Jones, supra,*[18] that the statute, Section 8[19] of the Extortion Act could not be held to be a legislative act. If so considered the act itself would be unconstitutional and the act of the Commission thereunder would be a nullity.

This *C. B. & Q. R. R. Co.* v. *Jones* case[18] was a suit in debt brought by a shipper against the carrier to recover for alleged overcharges on intrastate shipments. Judge Magruder in the opinion of said case made an exhaustive discussion of the power granted the Railroad and Warehouse Commission under said Section 8[19] and held specifically that in entering such an order the Commission was not acting in a legislative capacity, but that by reason of the provisions of said statute, the order entered thereunder was only *prima facie* evidence as to the reasonableness of the rate, placing the burden upon such subject matter upon the complainants, and was merely prescribing a rule of evidence, the Court saying on pages 381-382:

> "That act *does not establish* reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners *the power to establish such rates.* When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, *there is no delegation to the board of the legislative power to establish rates.* The legislature thereby merely refrains from

[18] 149 Ill. 361, 381, 382.
[19] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But 'when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable.' (116 U. S. page 462)." (Italics ours.)

In the case of *The People* v. *Brady*,[20] the Court on page 105 made reference to the *C. B. & Q. R. R. Co.* v. *Jones* case,[21] *supra*, in the following language:

"In *Chicago Burlington & Quincy Railroad Co.* v. *Jones*, 149 Ill. 361, the constitutionality of an act of the General Assembly of this State was upheld as not being an attempted delegation of legislative power. The act provided: 'The railroad and warehouse commissioners are hereby directed to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freight,' etc."

It is obvious that a board like the Illinois Commerce Commission has no powers excepting those specifically given it by statute, and Exhibit "D" (Tr. 193-213) being passed under Section 8[22] of the Extortion Act, can be considered only as evidence bearing upon the reasonableness of the rate charged.

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[20] 271 Ill. 100, 105.
[21] 149 Ill. 361.
[22] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

While the opinion in the case of *C. B. & Q. R. R. Co.* v. *Jones*[21] was rendered before the institution of the Illinois Commerce Commission and the awarding of reparation was invested in common law courts, nobody questions the power to determine the reasonableness of rates was taken from the courts and lodged in the Illinois Commerce Commission.

In the case of *Public Utilities Com.* v. *C. & W. T. Ry. Co.*,[23] the carriers on July 1, 1913 had established a passenger rate of 5c per mile from Chicago to La Grange and intermediate points. Thereafter on December 30, 1913 the carriers increased this rate and filed their schedules with the Public Utilities Commission covering such increase. Petitions were filed by the relators before the Commission, asking that the carriers be directed to return to the old rate. An order was entered accordingly and an appeal taken to the State Supreme Court which held that the Commission should have heard evidence on the subject matter of the reasonableness of the increased charge.

In the course of its opinion the Court said (pp. 566, 567):

> "Section 72 of the act (Public Utilities Act) provides that when complaint has been made to the commission concerning any rate, and the commission has found, *after a hearing*, that a public utility has charged an excessive or unjustly discriminatory amount for any service, the commission may order that the public utility make due reparation to the complainants therefor, with legal interest from the date of payment of the illegal charge. The statute thus affords a remedy against the continuation of excessive or unjustly discriminatory rates by establishing just and reasonable ones through the commission and at the same

[23] 275 Ill. 555, 566, 567, 568, 569.

time empowers it to compel reparation for overcharges."

And again on pages 568-569 the Court said:

"It is argued by appellant that it is beyond the power of the commission to interfere with a railroad organized under the Railroad act in the fixing of its passenger rates so long as it does not discriminate. The basis of this contention is that the legislature, in pursuance of section 12 of article 11 of the constitution of 1870, passed the Maximum Fare law of 1907 fixing the reasonable maximum fare at two cents a mile, and that the fixing of a reasonable maximum rate by the legislature was, in effect, the fixing of a reasonable rate under the direction of the constitution, and that such reasonable rate cannot be fixed or changed except by a direct act of the legislature. We are not able to sustain this contention upon any authority or reason. No authority is cited in support thereof. Said act of 1907 was especially saved from repeal by section 41 of the Public Utilities act. The plain meaning of a reasonable maximum rate, as used in the act of 1907 and as used in said section of the constitution, is simply a reasonable limit beyond which the railroads cannot go in fixing their rates, and by section 41 aforesaid the commission cannot go beyond or higher than that rate in fixing a just and reasonable rate. The commission is explicitly authorized to fix a rate lower than the two cents per mile if the evidence shows that a lower rate is just and reasonable and sufficient, and such provision is not in violation of said section of the constitution."

We respectfully submit that these decisions, each of which involved the construction of a schedule of reasonable maximum rates, established beyond question that a schedule of reasonable maximum rates passed under the authority of Section 8 [24] of the Extortion Act is merely a

[24] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

rule of evidence and not a legislative act. There is no decision in the State Supreme Court to the contrary where the question was squarely in issue.

3.

**The uniform practice and procedure which has obtained before the Illinois Commerce Commission for many years past is that the effect of a schedule of reasonable maximum rates, when introduced into evidence before the Commission, is only prima facie proof, placing the burden upon the complainants of proving that such rates are unreasonable. The decision of the Circuit Court of Appeals destroys a common law and statutory right heretofore inherent in the residents of the State of Illinois.**

The Court will notice that this finding is contained in the record herein (Exhibit "5", Tr. 156), where the Commission said:

> "The record shows that the rates complained of are the same or somewhat lower than the Illinois Distance Maximum Scale. This being the case, the burden of proof is upon the complainants to show that such rates are unjust, unreasonable or otherwise unlawful, in accordance with the decisions of the Supreme Court of Illinois in *Public Utilities Com.* v. *A. T. & S. F. Ry. Co.*, 278 Ill. 58, *Commerce Com.* v. *C. C. C. & St. L. Ry. Co.*, 320 Ill. 214."

An examination of this latter case, *Commerce Com.* v. *C. C. C. & St. L. Ry. Co.*,[25] shows that the claim before the Commission was for the establishment of a lower rate and reparation. The decision shows that the rate complained of was the result of the increases and decreases made during the World War and thereafter, one of which was an order directing a general reduction of 10 per cent on all freight issued under the same authority as Exhibit "D" herein, and the Court said on page 219:

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[25] 320 Ill. 214, 219.

"The burden of proof was on the brick company to show that the rate of which it complains is unreasonable. (*Public Utilities Com.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 278 Ill. 58.)"

The decision did not hold that said order of reduction was legislative in character, but held that the evidence before the Commission did not justify the relief asked for and remanded it to the Commerce Commission for further proceedings.

See also Tr. 104 and 123.

A few of the many representative cases in which the effect of the same ruling was observed by the Illinois Commerce Commission are:

*Egyptian Tie & Timber Company* v. *M. P. Ry. Co., et al.*, 5 Ill. C. C. 447, 448, 450, 451;

*Western Stoneware Company, et al.* v. *C. B. & Q. R. R. Co.*, 5 Ill. C. C. 561,

where the Commission said on page 564:

"Defendants also show that at the present time the rates actually applied for the transportation of bituminous coal are substantially less than the maximum rates prescribed by the Commission. It has never been contemplated that the maximum rates prescribed by the Commission should be applied for the transportation of bituminous coal."

*Robert Atkinson* v. *C. B. & Q. Ry. Co.*, 5 Ill. C. C. 559;

*Warfield Lumber and Coal Co.* v. *C. B. & Q. Ry. Co.*, 5 Ill. C. C. 626;

*Northwestern Timber Company* v. *A. T. & S. F. Ry. Co.*, 5 Ill. C. C. 429, 430;

*Northwestern Timber Company, et al.* v. *A. T. & S. F. Ry. Co., et al.*, 6 Ill. C. C. 540, 541;

*Castleman Brothers Timber Company and Paul & Washburn* v. *B. & O. R. R. Co., et al.*, 6 Ill. C. C. 755, 756;
*Egyptian Tie and Timber Co.* v. *M. P. R. R. Co.*, 6 Ill. C. C. 757, 759, 761, 764;
*Egyptian Tie & Timber Company* v. *M. P. R. R. Co.*, 6 Ill. C. C. 142, 146, 148;
*City of East Moline, et al.* v. *A. T. & S. F. Ry. Co.*, 7 Ill. C. C. 848,

where the Commission said on page 853:

> "The Illinois maximum scale of rates on coal is seldom applied between points in the State of Illinois and was made higher than it would otherwise have been made had it not been that the commission desired, at the urgent request of the coal operators and railroads of this state, to avoid disturbing the present method of grouping mines and applying a common rate from the entire group to common destinations."

*Anderson Coal & Ice Co., et al.* v. *C. B. & Q. R. R. Co., et al.*, 7 Ill. C. C. 828, 831; and
*Moline Chamber of Commerce, et al.* v. *C. B. & Q. R. R. Co., et al.*, 7 Ill. C. C. 835, 838.

These cases demonstrate the public effect caused by the decision herein complained of and the ruling of the Circuit Court of Appeals would have made impossible the awarding of reparation in the above cases.

In Illinois the doctrine of contemporaneous construction to the effect that where the execution of a statute is confined to a particular department of the Government, the Court will regard and in doubtful cases adopt the construction acted on in such department and long continued practice therein may reduce the uncertainty to a fixed rule.

*Comstock* v. *Cover*,[26] *People* v. *Fidelity and Casualty Co.*,[27] *C. T. & T. Co.* v. *Central Republic Trust Co.*,[28] and *Barrett* v. *Reuter*.[29]

The Court will notice that the order, Exhibit "D" (Tr. 193-213) on its face is applicable not only to the receivers of The Chicago and Alton Railroad Company but every common carrier operating in intrastate traffic in the State of Illinois is enumerated therein (Tr. 196, 197, 198). Therefore the effect of this decision is statewide and affects every shipper in the State of Illinois, depriving them of their common law and statutory rights.

The decision herein complained of being "squarely in the teeth" of the statute and the holding in *C. B. & Q. R. R. Co.* v. *Jones*,[30] *supra*, it cannot but have the effect of limiting and destroying the power of the Commission to award reparation, as provided under Section 72 of the Public Utilities Act.

4.

**The decision of the United States Circuit Court of Appeals herein is contrary to the decisions of said Court in the Fifth Circuit, wherein similar orders were held to be ineffective as legislative acts because they did not establish specific rates for the transportation involved and that rates adopted under similar circumstances were carrier-made rates and always open to inquiry as to their reasonableness.**

The order, Exhibit "D" (Tr. 193-213), herein does not purport to deal specifically with the rates involved in this proceeding. In fact, it negatives such a contention

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[26] 35 Ill. 470.
[27] 153 Ill. 25, 39.
[28] 299 Ill. App. 483, 496.
[29] 289 Ill. App. 221, 230.
[30] 149 Ill. 361.

(Tr. 85, 86, 194, 195). It was entered as a mere approval of the carriers' request for statewide readjustment of the war rates, to conform with a like order of the Interstate Commerce Commission (Tr. 158, 159), and does not pretend to pass upon any specific rates, as will appear from the cases hereinafter cited, they were carrier-made rates as distinguished from commission-made rates, and are always open to question.

This order was entered by the Commission for the purpose of making the freight rates on intrastate shipments conform to the rates on interstate shipments, which rates had been increased during the World War under order of the Director General and subsequently by common carriers by permission of the Interstate Commerce Commission.

It recites the previous orders of the Commission, one of which specifically provided:

> "Nothing contained herein shall be construed as an approval of the reasonableness of the individual intrastate rates as such. On the contrary, the purpose of this order is to give State approval to the application of the general percentage increase of intrastate rates fixed by the Interstate Commerce Commission in case 11703" (Tr. 195).

This affirmatively shows that so far as specific rates were concerned in permitting the increase, the Commission negatived the contention that its action bore in any way upon the reasonableness of the individual intrastate rates as such.

The order continued:

> "The Commission having fully considered all of the evidence adduced and all the representations and arguments herein and being fully advised in the premises finds that the level of rates fixed by the

Interstate Commerce Commission and observed on interstate traffic between points in the Eastern District, including Illinois, should be observed in Illinois" (Tr. 195).

The order then continued:

"The Commission further finds that to accomplish this the Schedule of Reasonable Maximum Rates of Charges for the Transportation of Freight No. 2, issued by the Illinois Commerce Commission, hereby made a part of this order, should be approved for intrastate application in the State of Illinois" (Tr. 195-196).

"It Is Therefore Ordered that the Schedule of Reasonable Maximum Rates of Charges for the Transportation of Freight No. 2, issued by the Illinois Commerce Commission be, and the same is hereby declared to be the maximum rates of charges for the transportation of freight intrastate in the State of Illinois on the following railroads:" (Enumerating all the railroads in Illinois including the Receivers of the Chicago & Alton Railroad Company.) (Tr. 196.)

Thus it affirmatively appears from the order itself that the Commission did not deal with the reasonableness of any specific rates, leaving to the carrier the right by its tariffs to fix rates within the limits permitted in the order as carrier-made rates and not commission-made rates.

It is obvious that, as affirmatively appears from the sections of the Illinois Commerce Commission Act above quoted, which in mandatory language forbids the collection by the carrier of an unreasonable rate, and vested in the Commission the power to determine whether the rates charged by it were or were not unreasonable that the subject matter of a rate fixed by the carrier would be an

open question for the Commission to pass upon regardless of this Exhibit "D" (Tr. 193-213).

This principle is specifically recognized in the case of *Arizona Grocery Co.* v. *A. T. & S. F. Ry Co.*,[31] where the Court said on page 388:

> "As respects a rate made by the carrier its adjudication finds the facts and may involve a liability to pay reparation."[32]

See also *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*,[33] where the Court said on page 445:

> "The decision of the Circuit Court of Appeals for the 9th Circuit in *A. T. & S. F. Ry. Co.* v. *Arizona Grocery Co.*, 49 F. (2d) 563, to the effect that the Commission was without jurisdiction to award reparation, proceeded on the theory that the rates there involved were Commission-made. The rate here involved in our opinion was made by the carriers, and if it was, of course, the Commission, upon a valid finding that it was excessive, had the power to award reparation."

It affirmatively appears from the opinion in this *Eagle Cotton Oil Co.* case,[34] *supra,* that the rates therein involved were precisely the same as the rates involved herein. Compare the opinion in *Eagle Cotton Oil Co.* case, *Texas & Pacific Ry. Co.* v. *Louisiana Oil & Refining Co.*,[35] and the record (Tr. 90, 157-159, 194-195) herein, and also what is shown on the face of Exhibit "D" (Tr. 194, 195).

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[31] 284 U. S. 370, 388.

[32] The Supreme Court held that the rate involved in the **Arizona Grocery Company case** was a commission-made rate.

[33] 51 Fed. (2d) 443, 445 (5th Circuit).

[34] 51 Fed. (2d) 443 (5th Circuit).

The court said in *Texas & Pacific Ry. Co.* v. *Louisiana Oil & Refining Co.*,[35] on page 468, *et seq.*:

"All of these orders, as the reports show, were made under the influence of the war, and of the inflation and deflation which were its aftermath. The controlling considerations in these proceedings were the general ones of obtaining revenue for the carriers, while meeting the need of and stimulating shipping and business. The reasonableness of particular or specific rates was neither determined nor considered; the orders were blanket orders revising all rates upward at one time, downward at another. If these proceedings are construed to be specific fixings of specific rates, they have resulted in making substantially all rates commission made, for general in their terms, they gave sanctions for and applied sanctions to, every tariff schedule the country over. That it was not meant by the *Arizona Grocery Company* case to hold rates made as these were commission made, is made certain, we think, by this statement in the opinion, 'it is also to be observed that, so long as the act continues in its present form, the great mass of rates will be carrier-made rates.' 284 U. S. 390, 52 S. Ct. 183-186. This could not be so if the general sanctions of the commissions' orders in the 'Increased Rates of 1920' and 'Reduced Rates, 1922' proceedings, amounted to commission prescribing or approval of all tariffs promulgated pursuant thereto. Our case of *Eagle Cotton Oil Co.* was as to the question involved, the same case as this. The rates for which reparation was awarded there was a rate made up, as these were, under the general sanctions of this war and after war general orders. The view we took there, and take here, that rates made as these were not commission-made rates is in accord, we think, with the *Arizona Grocery* case, and in accord with the interpretation the Supreme Court has given that case in *Great Northern R. R.* v. *Sunburst*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254. It is in accord, too, with the *Brimstone* case, 276

[35] 76 Fed. (2d) 465, 468, et seq.

U. S. 104, 48 S. Ct. 282, 72 L. Ed. 487, and with *United States* v. *Louisiana,* 290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 181."

Note the similarity between the rates in Exhibit "D" (Tr. 90, 157-159, 194, 195), and those commented upon in the *Louisiana* and *Eagle Cotton Oil Company* cases.

5.

**The United States Circuit Court of Appeals in its opinion erred in construing the holdings in C. B. & Q. R. R. Co. v. Jones, 149 Ill. 361, C. B. & Q. R. Co. v. The People, 77 Ill. 443, Public Utilities Commission v. A. T. & S. F. Ry. Co., 278 Ill. 58, and Arizona Grocery Company v. A. T. & S. F. Ry. Company, 284 U. S. 370, and in the conclusions drawn therefrom.**

The Court will notice that of the three Illinois cases above mentioned the only one thereof that is similar to the case at bar is *C. B. & Q. R. R. Co.* v. *Jones,*[36] *supra.* This was a suit in debt wherein the amended declaration set forth several counts based upon the claim for penalty due to overcharges exacted by the carrier exceeded the schedule of reasonable maximum rates prescribed by the Railroad and Warehouse Commission, but the last count thereof did not count on the statute, but averred that for certain shipments the rates charged and received were unreasonable and that the appellant became indebted to the appellee for the overcharges in excess of a reasonable rate. The jury rendered a verdict for the plaintiff for $2,868.60, and the court rendered a judgment upon the verdict and added thereto an attorney's fee. By demurrers, pleas and instructions given to the jury the question of the validity and the legal effect of the schedule of

[36] 149 Ill. 361.

reasonable maximum rates, which was introduced into evidence, prescribed by the Railroad and Warehouse Commission, was presented and passed upon by the Court, wherein the Court among other things, held specifically that the schedule of reasonable maximum rates was merely a rule of evidence, having only *prima facie* effect on the subject matter of the reasonableness of the rates charged.

The Court will notice that the reparation granted the plaintiff is in odd numbers and such numbers would not be used unless they were acting under the last count mentioned.

The Court will notice that the United States Circuit Court of Appeals in its opinion in referring to this *Jones* case (Tr. 288) erred in considering that it involved the recovery of a penalty only. The fact of the matter is that it was a judgment for reparation under the last count.

Taking into consideration that the question of determining the reasonableness of the rates charged was transferred from the common law courts to the Illinois Commerce Commission, the decision in the *Jones* case, *supra*, is a "red letter" case on "all fours" to the case at bar.

The case of *C. B. & Q. R. Co.* v. *The People*,[37] *supra*, was also an action in debt to recover penalties under the act to prevent extortion and also contained a count for unjust discrimination. A demurrer was filed to the pleas, which was sustained. The defendant contended that the demurrer should be carried back to the declaration and sustained against it, which contention the Court below overruled. The defendant elected to abide by its pleas.

[37] 77 Ill. 443.

A jury was waived and the Court fixed the penalty for violating the statute at $1,000.00. No question of reparation was involved in the case.

The Court will notice that the amount of $1,000.00 was fixed as a penalty and the precise amount of damages due to the reparation was not considered, which distinguishes the case from that of *C. B. & Q. R. R. Co.* v. *Jones*,[38] *supra*.

The Court held that the demurrer should be carried back to the declaration and sustained against it instead of the pleas and the judgment was reversed.

As to the holding in this case the Circuit Court of Appeals said (Tr. 288).

> "The court further stated that there would be no liability for unreasonable charges 'for taking the rates fixed by the schedule, or less rates, * * * even though proof might be made that the rates so taken were more than fair and reasonable rates.' In short, the Supreme Court of Illinois construed the language to mean that the rates fixed by the schedule were the maximum rates which could be 'deemed and taken in all courts' as *prima facie* reasonable; but the Court also recognized that rates higher than those fixed in the schedule could be charged without violating the extortion act if such rates were proved to be reasonable. Such rates, however, since they were higher than the maximum reasonable rates of the schedule, could not be 'deemed and taken in all courts' as being *prima facie* reasonable."

It appears from the above quotation that the United States Circuit Court of Appeals was confused in drawing its conclusion from the opinion in this case. Even from the quotation above recited the proper conclusion is that

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[38] 149 Ill. 361.

the maximum scale is not conclusive even if higher rates were collected by the carriers provided that such higher rates were reasonable. In equality before the law, if the rates collected were below the schedule of reasonable maximum rates they could still be found by the commission to be unreasonable. See *Barris* v. *Chicago B. & Q. R. Co.*, p. 341, *infra*,[39] pp. 44-45. The Schedule of maximum rates merely being a rule of evidence, it places upon the contestants the burden of proving the reasonableness, and is not a legislative act.

The case of *Public Utilities Commission* v. *A. T. & S. F. Ry. Co.*,[40] *supra*, was an appeal from a judgment of the State Circuit Court affirming an order of the State Public Utilities Commission, which disapproved a proposed increase of rates sought by the carriers on intrastate shipments. The carriers filed with both the Interstate Commerce Commission and the Railroad and Warehouse Commission, predecessor of the Public Utilities Commission, schedules increasing the rates on grain. Certain associations and chambers of commerce filed a petition with the Railroad and Warehouse Commission, objecting to and protesting against the increases made by the tariffs.

Back in 1906 the Railroad and Warehouse Commission had fixed a schedule of maximum rates. Subsequently the carriers filed tariffs proposing certain increased rates. The Railroad and Warehouse Commission suspended and postponed the effective date thereof until after the passage of the act creating the Public Utilities Commission.

The Public Utilities Commission after a hearing further suspended said schedule and finally disapproved of the proposed increase. An appeal was taken to the Circuit

[39] 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449.
[40] 278 Ill. 58.

Court of Sangamon County, where the order of the Public Utilities Commission was affirmed and the carriers brought the case to the Supreme Court of Illinois.

In this case there was no claim for reparation involved. The question involved was the right of the carriers to increase the rates and the Court considered the petition of the petitioners a protest against such proposed increases and heard evidence on that subject matter.

The Court held that the evidence presented was not sufficient to justify the increases and the judgment was reversed with instructions to the Commission to hear further evidence on that subject matter.

In its decision the Court held that where the schedule of reasonable maximum rates, was introduced into evidence, rates within the limits of that schedule could not be suspended by the Railroad and Warehouse Commission, which it had sought to do, but that the Public Utilities Commission had such power, and that its action in so doing was valid.

In its order the Commission had held that the schedule of reasonable maximum rates placed the burden of proof on the subject matter of reasonableness upon the carriers. This the Court held to be error and that the correct rule was that such schedule placed the burden of showing the unreasonableness of the proposed increase upon the protestants. This clearly indicates that in adopting a schedule of reasonable maximum rates the Commission was not acting in a legislative capacity, but was merely establishing a rule of evidence between litigants.

In the course of its decision, among other things, the Court said, page 69:

> "One of the principal duties of the Railroad and Warehouse Commission was to fix a schedule of reasonable maximum rates and to change the same from time to time, as might be necessary under changing conditions of transportation. When such schedules were made and the charges fixed the carriers were required to file their tariffs, not exceeding the charges so fixed, and there can be no question but that it was the right of the carriers to fix their charges and be entitled to collect for freight transported accordingly. When the commission had done this its power was exhausted" (Tr. 289-290).

From which quotation the United States Circuit Court of Appeals drew the conclusion that the Illinois Supreme Court recognized the right of the carriers to fix their charges in accordance with schedules and to collect for freight transported on the basis of such rates, as though it were a legislative act.

In drawing this conclusion we respectfully submit that the United States Circuit Court of Appeals erred in giving an effect to the language quoted as though the Commission were acting in a legislative capacity.

The United States Circuit Court of Appeals basing its conclusion upon the above quotation brushed aside the specific holdings in *C. B. & Q. R. R. Co.* v. *Jones* case and *C. B. & Q. R. Co.* v. *The People* case with a statement that they were suits to recover penalties, and "left no doubt that the construction of the language in question in the earlier decision (*Jones case*) represented the true legislative intent and did not represent a strict construction for the purposes of a penalty suit."

It then drew the conclusion that the decisions of the State Supreme Court were to the effect that the adoption by the Illinois Commerce Commission of a reasonable

schedule of maximum rates was a legislative act fixing rates for the future and precluding any inquiry into the reasonableness of the rates charged.

We respectfully submit that we have shown that the subject matter before the Court in the *Jones case* was a judgment for reparation rendered notwithstanding the existence of a schedule of reasonable maximum rates being involved in the case.

The Court does not suggest any reason why the conclusion as to the legislative feature would be any different in a suit for reparation than it would be in a suit for penalty and there is no such reason.

The language of an opinion must be construed with reference to the facts and questions involved in the case in which it was rendered.

*Public Utilities Com.* v. *A. T. & S. F. Ry. Co.* case did not involve reparation. The main question in that case was whether the evidence was sufficient to support the findings of the order of the Commission as well as the power of the Commission to suspend attempted increased rates and incidentally the Court held that the Railroad and Warehouse Commission in adopting a schedule of reasonable maximum rates had exhausted its power on that subject matter, and the language quoted was used to justify the Court's conclusion to that effect.

It is clear that the Illinois Supreme Court did not have in mind any question of a complaint for reparation in the language quoted. This quotation merely restates the requirement of Sections 37 and 39[41] of the Public Utilities

[41] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., pars. 37, 39, 111⅔, Secs. 37, 39.

Act and has regard only to the duties of a common carrier in collecting freight rates.

It is obvious that this language when applied to a situation involving a claim for reparation would be clearly *obiter dictum* and certainly could not be held to overrule former decisions specifically holding to the contrary.

What the Illinois Supreme Court meant in the latter case was a recital of the well known limitations upon carriers charging for their services. A carrier is required to file tariffs and to collect the specific rates as therein provided, no greater or no less, any lesser rate than the tariff would constitute rebating, which is specifically forbidden by the statute.

When a Court overrules a former decision it always does it in specific terms. Neither the *Jones case, supra,* nor *Peoples case, supra* was ever mentioned in this *Public Utilities case, supra.* It is a strange contention that a court by *obiter dictum* would overrule its former decisions, without reference thereto, on a different subject matter.

It does not follow that because "it was the right of the carriers to fix their charges and be entitled to collect for freight transported accordingly" that the carrier could violate the provisions of the Public Utilities Act providing that every charge must be reasonable and non-discriminatory. We have already shown by the terms of Section 8 [42] of the Extortion Act and the *Jones case* that that was an open question to be passed upon by the Illinois Commerce Commission.

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[42] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

The result of the decision of the United States Circuit Court of Appeals operates to deprive shippers in Illinois of their constitutional rights.

The Illinois Constitution of 1870, Article II, Section 19, provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay."

Shippers without question had a common law right to enforce their claims for damages suffered by unlawful, excessive and discriminatory charges for transportation of their commodities by common carriers. By the Public Utilities Act, Section 72 [43] the legislature provided a special method of enforcing this common law right, but did not pretend to abolish the right, as was said in *Public Utilities Com.* v. *C. & W. T. Ry. Co.*,[44] *supra*, at page 567:

> "The statute thus affords a remedy against the continuation of excessive or unjustly discriminatory rates by establishing just and reasonable ones through the commission and at the same time empowers it to compel reparation for overcharges."

The effect of the Circuit Court of Appeals' decision, if allowed to stand, not only destroys shippers' common law rights, but abolishes and renders nugatory every statutory power conferred upon the Illinois Commerce Commission regarding rates of carriers, leaving in force only a power to adopt a reasonable maximum rate, which when issued could not be impeached or contested, although the statute authorizing the same provides specifically to the

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[43] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., par. 76, 111⅔, Sec. 72.
[44] 275 Ill. 555.

contrary. This, of course, would leave all shippers at the mercy of the carriers and deprive them of any relief for excessive or discriminatory charges.

When you consider that the State Supreme Court in *C. B. & Q. R. R. Co.* v. *Jones*,[45] *supra*, a suit which involved a claim for reparation for overcharges made while a reasonable maximum scale of rates was existing, and held that the claimant was entitled thereto and specifically held that Section 8[46] of the Extortion Act, which provided for the schedule of reasonable maximum rates was under the terms of the statute merely *prima facie* evidence on the subject matter of reasonableness of the rates charged, placing the burden of proof on the protestants, and was not a legislative act on the part of the Commission, which case has never been overruled and has been followed by the Commission since its organization, we submit that the United States Circuit Court of Appeals erred in concluding that the above *obiter dictum* quotation from *Public Utilities Com.* v. *A. T. & S. F. R. Co.*, *supra*, overruled the doctrine as stated in the *Jones* case.

We further call the Court's attention to the language following the said quotation from the *Public Utilities Commission* v. *A. T. & S. F. Ry. Co.*[47] case *supra*, which was omitted from the opinion in the United States Circuit Court of Appeals, namely:

> "Of course, under such schedule there might be some individual cases of discrimination that would be cause for complaint and investigation, but there is no question of that kind in this case."

This emphasizes our contention that our State Supreme Court did not intend by its decision to prevent inquiry

[45] 149 Ill. 361.
[46] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

as to the lawfulness of any rate charged under the maximum schedule of rates.

The record shows that the question of discrimination was raised in this case and passed upon favorably to complainants by the Commission.

The complaint before the Commission (Tr. 99, 104) charged that the rates complained of were excessive and unjustly discriminatory.

The orders of the Commission (Tr. 115, 119, 125-129) find that the specific rates fixed were the just, reasonable and non-discriminatory rates and that reparation should be awarded the complainants on the shipments.

The evidence heard by the Commission not being shown herein, the presumption follows that there was evidence which bore upon the question of discrimination and justified the finding of the Commission in that regard.

The United States Circuit Court of Appeals further seeks to justify its action by the holding in the case of *Arizona Grocery Company* v. *A. T. & S. F. R. Co.*[48] The order in this case was entered not by any State Commission, but by the Interstate Commerce Commission under a specific power given by the Interstate Commerce Statute, Section 15, where on complaint or on its own motion after a full hearing the Interstate Commerce Commission was given the power to fix the specific rate thereafter to be charged.

In this *Arizona Grocery Company case*[49] the Court held that where the Interstate Commerce Commission in its

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[47] 278 Ill. 58.
[48] 284 U. S. 370.
[49] 284 U. S. 370.

legislative capacity, upon complaint and after hearing, declared the reasonable rate to be charged by a carrier, it might not at a later time, upon the same or additional evidence as to the fact situation existing when the order was entered, declare its prior finding as to reasonableness erroneous and due to the fact that the Commission acting upon complaint and after hearing under Sections 13 (1) and 15 acted in a legislative capacity, obviously it could not subsequently when acting in a quasi-judicial capacity, impeach its own legislative act. Obviously this ruling has no pertinency to the case at bar.

The Interstate Commerce Act contains no provision prescribing that rates have merely *prima facie* effect, placing the burden of the proof of reasonableness upon the protestants, as obtains in the State of Illinois.

6.

**The District Court correctly interpreted the law herein in holding that the rates complained of being carrier-made, the Commission had power to grant reparation due to their being unjust, excessive and discriminatory.**

As to the cases cited in the footnote of the opinion (Tr. 286) to the above proposition the Court said:

> "The prevailing view is contrary to the District Court's holding. See Annotations 97 A. L. R. 406; 9 Am. Jur. Sec. 175; *Montana Horse Products Co.* v. *Great Northern Ry. Co.*, 7 Pac. 2nd 919."

We have examined the cases referred to in this footnote and so far as any of them bear upon the subject matter of reparation they support our contention that where the rates involved are commission-made reparation is not allowed, but where they are carrier-made, reparation may be awarded. As was stated in *Montana Horse Products Co.* v. *Great Northern Ry. Co.*,[50] on page 923:

[50] 7 Pac. 2nd 919, 921, 923.

> "Rates under the Interstate Commerce Act are voluntary rates initiated and filed by the carriers, rather than prescribed or approved by the commission as under our laws. (Citing cases.) And the Interstate Commerce Commission is given power by the act to declare a rate unreasonable or discriminatory retroactively and to award reparation. No such power is given to the commission under our statutes."

The opinion on page 921 said:

> "By section 3794 it is provided, so far as pertinent, that power and authority is by the act vested in the board of railroad commissioners, and it is thereby made its duty 'to adopt, as soon as practicable,[51] all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs'."

No such power is given under Illinois Statutes. See, however, the case of *Barris* v. *Chicago, B. & Q. R. Co.*,[51] 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449, found in said annotations 97 A. L. R. 406, 426. This case is on "all fours" to the case at bar, wherein the Commission fixed a schedule of reasonable maximum rates, which under the statute was deemed *prima facie* evidence of the reasonableness thereof. The Court said, page 340:

> "We think it is nowhere claimed that the commissioners' schedule is intended to deprive the railway company of reasonable rates for transportation of freight; that is, if the schedule makes a rate that is less than reasonable the company may recover the reasonable rate, and in any action by the company to recover a rate in excess of the schedule rate the only effect of Sec. 17 would be to make the schedule rate *prima facie* reasonable, so that the company must overcome that effect by proof. The language of Sec. 2 is that 'all charges . . . shall be reasonable and just.' It is no more restrictive than permissive. It fixes the rights of both parties by a re-enactment of

[51] 97 A. L. R. 406, 426.

the common law. Confessedly, Sec. 17 does not operate to the prejudice of the company if the commissioners shall err in judgment and fix a rate less than what is reasonable. It seems to us the section has the same force and effect as to both parties. If the commissioners err in judgment and fix a rate too high to be reasonable, why should the shipper be required to pay it, or the company, if it receives it, be permitted to keep it? It will be seen that Sec. 17, when carefully read, does not attempt to deal with facts or conditions that are conclusive, but those that are *prima facie* only. Largely, its office is to fix a rule of evidence. That is one of the purposes of the act as indicated by its title. It is likely true that the purpose of the act, as to evidence, may have been intended more for proceedings before the commissioners than in courts; but it is equally true that it does fix a rule of evidence in courts."

The Court further said on page 341:

"It would seem to be a strange construction to so construe the language of the law as to make the schedules but *prima facie* as to the carrier and conclusive as to the shipper. Equality before the law is the correct rule, and should obtain in the absence of a clear legislative intent to the contrary."

In the above case the Iowa Supreme Court stated that the Iowa and Illinois Acts were substantially similar on the subject matter. The above citations emphasize the principle that a Commission-made rate is a legislative act, preventing reparation, but a carrier-made rate is always open as to its reasonableness when charged.

The Illinois Commerce Commission herein fixed no rates. It merely fixed a schedule of reasonable maximum rates acting under Section 8 [52] of the Extortion Act, which specifically provided that its action thereunder should

be only a rule of evidence, affecting the subject matter of reasonableness, the power to determine which was invested in the Commission and was determined by the Commission in this case.

## CONCLUSION.

The petitioner, the respondent, the United States District Court and the United States Circuit Court of Appeals herein all agree that the authority of the Illinois Commerce Commission in adopting this schedule of reasonable maximum rates—Exhibit "D" (Tr. 193-213) herein, was acting under the special power conferred upon the Commission by Section 8 [52] of the Extortion Act, and we respectfully submit that the United States Circuit Court of Appeals herein erred in attributing to said Exhibit "D" (Tr. 193-213) the effect of a legislative act, which was specifically forbidden by the act, which authorized its issuance; that all of the above mentioned cases of the Illinois Supreme Court adhered to the language found in said section forbidding any other interpretation than that given by the act; that the said schedule of reasonable maximum rates is not and cannot be considered in the nature of a legislative act, but is merely a rule of evidence affecting the burden of proof on the subject of reasonableness; that the subject of determining the reasonableness of the rates charged is invested by statute solely in the Illinois Commerce Commission and the reparation orders entered herein were made after the introduction of said Exhibit "D" (Tr. 193-213) before it, and other evidence heard in rebutting the same, and that said finding on the subject matter of reasonableness was an administrative question, the decision of which is invested in the Commission and not in the Court. This decision by holding that a schedule

of reasonable maximum rates passed under the authority of Section 8 [53] of the Extortion Act, was a legislative act, the schedule being statewide and affecting every carrier in Illinois, which decision is certainly contrary to law and controlling decisions, deprives every shipper in Illinois of his constitutional right of having a remedy for the damages he suffers from the unlawful acts of carriers and thereby involves a question of great public interest. For this reason we respectfully submit that by reason of the importance of the decision, it should be inquired into by this Honorable Court by a writ of certiorari.

Respectfully submitted,

THOMAS B. LANTRY,
C. B. CARDY,
WILLIAM F. GARMAN,
*Attorneys for Petitioner.*

Dated April 2, 1941.

**Certificate of Service.**

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The undersigned attorneys for respondent hereby acknowledge notice of the filing of the petition and receipt of a copy of the petition, printed record and supporting brief, this 2nd day of April, 1941.

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*Attorneys for Respondent.*
1400 First National Bank Bldg.,
Chicago, Illinois.

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[52] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.
[53] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.